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FILED IN THE  
U.S. DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

JUN 29 2010

JAMES R. LARSEN, CLERK  
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SPOKANE, WASHINGTON

**UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF WASHINGTON**

SHARON A. BRIDGE SUMNER,

Plaintiff,

v.

ANDREW S. ASDELL, Tax  
Compliance Officer; MAXIMILLIAN  
EDWARDS, Revenue Officer;  
MARGE KENT, Revenue Officer; and  
THE UNITED STATES OF  
AMERICA;

Defendants.

No. CV-10-207-EFS

PLAINTIFF'S  
MEMORANDUM  
OF AUTHORITIES  
IN SUPPORT OF  
TEMPORARY  
RESTRAINING  
ORDER

Plaintiff, through her attorney, submits the following points  
and authorities in support of a temporary restraining order and  
permanent injunction:

Pl. Memo in Support of TRO - 1

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## BACKGROUND

Fed.R.Civ.P 65(b) allows temporary restraining orders to be issued without notice. At this time, no levy for any wages is unsatisfied, hence security or bond is not an issue. Defendants have been furnished with a draft of this complaint. The statute is clear. It states in its relevant parts as follows:

§ 7426. Civil actions by persons other than taxpayers.

(a) Actions permitted.-

(1) Wrongful Levy.-If a levy has been made on property or property has been sold pursuant to a levy, any person (other than the person against whom is assessed the tax out of which such levy arose) who claims an interest in or lien on such property and that such property was wrongfully levied upon may bring a civil action against the United States in a district court of the United States. Such action may be brought without regard to whether such property has been surrendered to or sold by the secretary .....

(b) Adjudication.-The district court shall have jurisdiction to grant only such of the following forms of relief as may be appropriate in the circumstances:

(1) Injunction.-If a levy or sale would irreparably injure rights in property which the court determines to be superior to rights of the United

1 States in such property, the court may grant an  
2 injunction to prohibit the enforcement of such levy or  
3 to prohibit such sale.

4 (2) Recovery of property.-If the court  
5 determines that such property has been wrongfully  
6 levied upon, the court may-

7 (A) order the return of specific  
8 property if the United States is in possession of such  
9 property.

10 Judge Robert McNichols' opinion in *Sodorff v U.S.*, 614  
11 F.Supp. 74, (E.D. Wn 1985) is exactly in point. The Court states  
12 at 76:

14 "The only logical interpretation of the quoted section  
15 is that if the court determines that the rights in  
16 property of one other than the taxpayer are superior  
17 to the United States and a sale would irreparably  
18 injure that person's right, the court may enjoin the  
19 sale. Consequently, I conclude that this court has  
jurisdiction."

20 The Anti-Injunction Act has eight exceptions. Plaintiff is  
21 within 26 U.S.C. § 7426(a) as she claims wrongful levy against  
22 her separate wages. Jurisdiction is obtained under 7426(b)(1) as  
23 irreparable injury is caused by a wage levy. Injunctive relief  
24 under (a)(1) is allowed as an exception to the general prohibition  
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28 Pl. Memo in Support of TRO - 3

1 of 26 U.S.C. 7421. Here, Plaintiff was never assessed the tax  
2  
3 either as a transferee under 26 U.S.C. § 6902 or any other  
4  
5 statute. A party who is levied on but who does not owe the tax  
6  
7 is not a taxpayer. *U.S. v Williams*, 514 U.S. 527, 535, (1995).  
8  
9 Other cases are *Flores v U.S.*, 551 F.2d 1169, 1171 (9<sup>th</sup> Cir.  
10  
11 1977); *Jensen v I.R.S.*, 835 F.2nd 196 (9<sup>th</sup> Cir. 1987); *Rodriguez*  
12  
13 *v U.S.*, 629 F.Supp. 333, 340 (N.D.Ill 1986); *Talbot v U.S.*, 850  
14  
15 F.Supp. 969 (D.C. Wyo 1994).

16  
17 The Washington State community or separate property  
18  
19 statutes apply to ownership or interest in earnings for federal tax  
20  
21 purposes. *Poe v Seaborn*, 282 U.S. 101, 110, (1930); *U.S. v*  
22  
23 *Mitchell*, 403 U.S. 190, 197 (1971). Separate property  
24  
25 agreements transmuting community earnings to separate  
26  
27 earnings are binding on the Internal Revenue Service. *Fleming*  
28  
29 *v. Commissioner*, T.C. Memo 1984-130. *Venie v. U.S.*, 61  
30  
31 A.F.T.R.2d 88-523, opinion by Justin L. Quackenbush. Ed Wn.  
32  
33 No. C-86-1012-JLQ, November 3, 1987.

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1 In *Bank of Nebraska La Vista v U.S.*, 949 F.2d 263 (8<sup>th</sup> Cir.  
2 1991), the Court held that the action by the Internal Revenue  
3 Service in failing to list a prior bank lien on a vehicle title caused  
4 irreparable harm when the vehicle was sold and the lien  
5 eradicated by the IRS' actions.  
6  
7

8 Here the notice of seizure was on June 21, 2010. The  
9 action is brought within the nine month period of 26 U.S.C. §  
10 6532 (c)(1), if in fact it applies.  
11  
12

13 Whether or not the nominee, transferee or alter ego  
14 doctrine can apply in federal matters requires the application of  
15 state law. *Wolfe v U.S.*, 806 F.2d 1410 (9<sup>th</sup> Cir. 1986); *Talbot v*  
16 *U.S.*, 850 F. Supp 969 (D.C. Wyo 1994).  
17  
18

19 Of prime importance in this case in so far as injunction is  
20 concerned is the fact that the Plaintiff never received to any  
21 notice or right to a hearing before the levy on her wages. Seizure  
22 without following any constitutional mandates against  
23 deprivation of property is not allowed by any specific section of  
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1 the Internal Revenue Code, nor has state action been  
2 commenced.  
3

4 *Philip Morris USA v. Williams*, 549 U.S. 346, 353 (2007)  
5 holds that due process is violated when judgment is awarded  
6 against strangers to litigation who are not provided notice and  
7 opportunity to defend. The Ninth Circuit holds that traditional  
8 due process forbids punishment where a non-party victim is  
9 unable to present a defense. *Merrick v. Paul Revere Life*  
10 *Insurance*, 500 F.3d 1007, 1015 (9<sup>th</sup> Cir. 2007). Plaintiff was  
11 never served with any notice nor was she joined in the IRS  
12 assessment made against her husband. She has no notice  
13 whatsoever of Defendant's action. The IRS intentionally levied on  
14 her pay. The Internal Revenue Manual IRM 5.11.2.1.7 states at  
15  
16 (2):  
17  
18  
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22 **If the levy is mailed, do not send the taxpayer**  
23 **copy immediately.** Wait long enough so the  
24 taxpayer does not get the levy before the levy source  
25 does. Consider local experience with mailing times  
26 and promptness of a particular entity's compliance.  
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28 Pl. Memo in Support of TRO - 6

1           IRM 5.11.5.4.5 instructs that exemptions can be denied if  
2  
3 they defeat the levy. Plaintiff was denied exceptions for her  
4 children on the one half of her salary as the IRS Manual requires  
5 that the exemptions are applied to the one half that goes to  
6 Plaintiff. This treatment violates due process.  
7

8           *McDonald v. Chicago*, No. 08-1521, U.S. Supreme Court,  
9  
10 June 28, 2010, holds that basic rights of due process that are  
11 within the historical conception of due process are inherent. The  
12 right to be paid is inherent to due process.  
13

14           Specifically, the Internal Revenue Code, 26 U.S.C. § 6330  
15  
16 (a) and (d) provide for a notice and hearing prior to levy. The Tax  
17 Court in *Shea v. Commissioner*, 112 T.C. 183, 197 (1999)  
18 requires that a separate petition notifying a spouse of  
19 community property liability must be contained in the notice of  
20 deficiency. Plaintiff never received any notice. Her spouse's  
21 notice did not refer to community property rights.  
22  
23

24           *Fuentes v Shevin*, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d  
25  
26 556 (1972); *Sniadach v Family Finance Corporation of Bay View*,

27  
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1 395 U.S. 337, 89 S.Ct. 1820 23 L.Ed 2nd 349 (1969); *Tulsa*  
2  
3 *Professional Collection Service v Pope*, 485 U.S. 478, 108 S. Ct.,  
4 1340, 99 L. Ed, 2d 565 (1998) all clearly hold that due process  
5 requires notice, and a chance to be heard in a court of  
6 competent jurisdiction before property can be seized or sold. No  
7 such constitutionally protected procedure has occurred here,  
8  
9 hence an injunction against levy should issue on the theory that  
10 federal constitution protects against the seizure and sale of third  
11 party property without due process.  
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14 The Plaintiff's affidavit filed herein establishes the separate  
15 property agreement. This law in the district prohibits a levy on  
16 the spouse whose earnings are agreed to be separate.  
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19 The community property law of Washington also applies  
20 and prohibits a levy on the wages of the non-debtor spouse. 19  
21 Wash. Prac. § 14.7 states "recovery is limited to the earnings of  
22 a spouse who owes the separate debts." The levy is on the salary  
23 of plaintiff who does not owe the taxes. *Haley v Highland*, 142  
24 Wash. 2d 135, 148, 12P.3d 119 (2000) reviews the statute,  
25  
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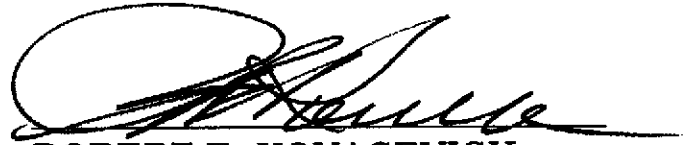
1 Wash.Rev.Code 26.16.200 and states "Furthermore, under this  
2 court's decisional law, community property is generally not  
3 available to satisfy the separate debts of either spouse." The  
4 1969 amendments, even if applicable, require that an action  
5 against the spouse must be completed within 3 years. The  
6 Internal Revenue Code 26 U.S.C. § 6330(a) and (d); 6331(a)  
7 added in 1998 require notice and hearing and a right to a fair  
8 hearing [6330(b)] before a levy can be made. A tax court review  
9 before levy is also allowed. 26 U.S.C. § 6330(d)(i).

14 Plaintiff never received any of the prior notice statutory  
15 requirements. 26 U.S.C. § 6304 also prohibits "any abuse of any  
16 person in connection with the collection of any unpaid tax."  
17 Abuse would include the levy without notice. This section also  
18 grants jurisdiction to the District Court. 26 U.S.C. § 6304(c); 26  
19 U.S.C. § 7433(a). The injunction is proper and meets all legal  
20 precedent.  
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Dated this 29<sup>th</sup> day of June, 2010.

Respectfully Submitted,



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